

1
2
3
4

5 IN THE UNITED STATES DISTRICT COURT

6
7

FOR THE NORTHERN DISTRICT OF CALIFORNIA

8
9
10

DENISE R. MALIK,

No. C 03-04362 CW

Plaintiff,

ORDER DENYING
PLAINTIFF'S
MOTION FOR
SUMMARY JUDGMENT
AND GRANTING
DEFENDANT'S CROSS
MOTION FOR
SUMMARY JUDGMENT

v.

11 JO ANNE B. BARNHART,
12 Commissioner of Social Security,

Defendant.

13

14
15
16
17
18
19
20
21

Plaintiff Denise R. Malik moves for summary judgment or remand. Defendant Jo Anne B. Barnhart, Commissioner of the Social Security Administration, opposes the motion and cross-moves for summary judgment. Having considered all of the papers filed by the parties, the Court DENIES Plaintiff's motion and GRANTS Defendant's cross-motion for summary judgment.

22

BACKGROUND

23

I. Procedural History

24
25
26

On June 9, 2000, Malik¹ applied for Supplemental Security Income benefits under Title XVI of the Social Security Act (the Act), 42 U.S.C. § 1381 et seq., alleging that her disability

27
28

¹ Malik is identified by the last name "Oliver" throughout much of the record but provides no explanation for the change of name.

1 began on December 29, 1988, due to psoriasis that caused pain
2 and numbness in her fingers. (Administrative Record (AR) 93).
3 Her application was denied initially and on reconsideration.
4 (AR 79-82, 85-88). On May 21, 2002, a hearing was held before
5 an administrative law judge at which Malik, who was represented
6 by a non-attorney, appeared as a witness. (AR 42-76). On
7 August 23, 2002, the ALJ issued his ruling that, although Malik
8 was precluded from work requiring fine manipulation of objects
9 or sensation in the fingertips, she was not disabled within the
10 meaning of the Act because she retained the residual functional
11 capacity to perform unskilled medium, heavy and very heavy work.
12 (AR 25-37). On October 22, 2002, Malik filed a request for
13 review with the Social Security Appeals Council. (AR 21). On
14 July 25, 2003, the Appeals Council affirmed the ALJ's decision.
15 (AR 4-6). On September 26, 2003, Malik filed the instant
16 action, claiming that the ALJ erred in finding that she could do
17 medium, heavy and very heavy work.

18 II. Factual History

19 Malik was thirty-seven years old at the time she filed her
20 application for Social Security benefits. She attended school
21 through the eleventh grade. (AR 47). Malik worked for
22 unspecified time periods in 1979 for Church's Fried Chicken; in
23 1985, 1986 and 1988 for a packaging company; and in 1989 for
24 McDonalds and another unspecified employer. (AR 98-99). Malik
25 has not been employed since 1989. She lives in an apartment
26 with her husband, her twenty-one year old daughter, her three
27 year old daughter and her sister. (AR 46).

1 A. Medical Evidence

2 On May 10, 1996, Malik went to Kaiser Permanente and
3 complained of pain in her left index finger. (AR 283). A
4 physical examination revealed a detached fingernail. Her
5 fingernail was removed and papilloma² of the distal nailbed was
6 noted. On May 14, 1996, an x-ray of her left fingers revealed
7 no significant abnormalities. On May 20, 1996, Dr. Tenner noted
8 Malik had pus underneath her fingernails. (AR 277). A
9 treatment note dated May 23, 1996 indicated her finger improved
10 with medications such as Cipro,³ though she was still having
11 moderate pain at the proximal end of her finger. (AR 274-75).
12 Repeat x-rays of her left fingers revealed no significant
13 abnormalities or changes, ruling out osteomyelitis.⁴ (AR 276).
14 Malik was diagnosed with a localized form of pustular psoriasis
15 in her left index finger which did not involve an infection.
16 (AR 274). On June 26, 1996, Dr. Tenner noted that pustular
17 psoriasis was beginning to flare in her right hand. (AR 271).
18 Various medications were prescribed in varying dosages,

19
20
21

22 ² Papilloma is a circumscribed, benign tumor projecting from
23 the surrounding surface. Stedman's Medical Dictionary, 27th
ed., 1307 (2000).

24 ³ Cipro is a synthetic broad spectrum antimicrobial agent
25 for oral administration. Physician's Desk Reference, 57th ed.,
875 (2003).

26 ⁴ Osteomyelitis is an inflammation of the bone marrow and
27 adjacent bone. Stedman's Medical Dictionary, 27th ed., 1284
(2000).

28

1 including Prednisone⁵ and Methotrexate.⁶ (AR 264, 247, 253). On
2 February 19, 1997, Malik reported she was no better and no
3 worse. (AR 249). On March 20, 1997, Dr. Tenner commented that
4 her psoriasis was better with the Methotrexate, although Malik
5 believed it made the psoriasis worse and more painful and she
6 did not want to continue taking it. (AR 245). On April 21,
7 1997, Dr. Rik Smith noted that her psoriasis was "okay," with no
8 joint swelling. (AR 239). On August 20, 1997, an examination
9 by Dr. Chitra Reddy revealed right thumb swelling and pain at
10 the first proximal interphalangeal joint. Dr. Reddy noted that
11 Malik had self-discontinued all of her medications, such as
12 Prednisone and Methotrexate, because she thought they were
13 making her psoriasis worse. (AR 229).

14 On September 26, 1997, Malik complained of bilateral hand
15 pain of two weeks duration and occasional numbness after using
16 her hands. (AR 223). Malik was referred to rheumatology for a
17 nerve conduction study. Treatment notes of December 18, 1997
18 indicate fungus was growing under Malik's fingernails. (AR
19 215). A nerve conduction study performed in February, 1998 was
20 normal. (AR 211, 214). In June, 1998, Malik was placed on
21
22
23

24 ⁵ Prednisone is a dehydrogenated analogue of cortisone with
25 the same actions and uses. Cortisone is a steroid-like compound
that influences the nutrition and growth of connective tissues.
Stedman's Medical Dictionary, 27th ed., 417, 754 (2000).

26 ⁶ Methotrexate is used to treat arthritis and rheumatoid
27 arthritis. Stedman's Medical Dictionary, 27th ed., 1107 (2000).

1 Thioguanine.⁷ (AR 205). On September 14, 1998, a treatment note
2 written by Dr. Tenner indicates Malik had taken Thioguanine for
3 only a few days in July and then had discontinued it. (AR 201-
4 02). Dr. Tenner indicated that Malik did not do well on oral
5 prescriptions due to compliance problems and side effects,
6 though no specific side effects were noted. (AR 201-02).

7 Also on September 14, 1998, it was determined that Malik was
8 pregnant and she was referred to genetics counseling because of
9 the potential risk of birth defects from the use of Thioguanine.
10 Her Thioguanine prescription was discontinued and no other oral
11 medications were prescribed for her psoriasis during her
12 pregnancy. (AR 185, 191). Malik continued to complain of
13 bilateral hand pain throughout her pregnancy. (AR 181).
14 Treatment records indicate a prior history of substance abuse
15 and Malik tested positive for cocaine during her pregnancy
16 according to urinalysis reports dated December 2, 1998 and March
17 25, 1999. (AR 171, 178, 324). Malik gave birth on March 31,
18 1999. (AR 176-77).

19 On September 9, 1999, Dr. Selby saw Malik in urgent care and
20 noted that she was off her medications and was not doing well.
21 Dr. Selby noted that lesions on her fingernails were quite
22 striking. (AR 172). On September 27, 1999, Malik was seen by
23 Kaiser Union City dermatology and diagnosed with psoriasis of
24 the second and third fingers of her right hand. (AR 173). Dr.
25

26 ⁷ Thioguanine is an agent used for leukemias and nephrosis.
27 Stedman's Medical Dictionary, 27th ed., 1827 (2000). Nephrosis
is degeneration of the kidneys. Id. at 1192.

1 Hardy recommended intramuscular steroids. Malik declined,
2 indicating she feared it might cause depression. (AR 173). Dr.
3 Hardy advised that oral medications would not be prescribed for
4 psoriasis without effective birth control. (AR 173). On
5 December 11, 1999, Malik went to the urgent care clinic
6 complaining of fingernail fungal infection and requested pain
7 medication. She was prescribed Tylenol #3.⁸ (AR 170). X-rays
8 of Malik's hands on December 23, 1999, revealed no evidence of
9 psoriatic arthropathy,⁹ yet changes in the tufts of the distal
10 phalanges of the right second and third fingers and left thumb
11 were noted. (AR 166). On June 2, 2000, Malik started
12 Methotrexate injections. (AR 154). A July 11, 2000 dermatology
13 note indicates that Malik's psoriasis was better. (AR 152).

14 On September 16, 2000, the Social Security Administration
15 referred Malik for a consultative examination conducted by Dr.
16 Anthony Gabriel. Dr. Gabriel detected severe onychomycosis¹⁰ at
17 the fingertips and nailbeds of the second and third fingers of
18 the right hand. He indicated that there was no evidence of
19 acute inflammation. Dr. Gabriel conducted a test of Malik's
20 upper extremities, including her wrists and hands. He indicated

⁸ Tylenol #3 is pain relief medication containing a moderate dose of codeine, a narcotic pain reliever. Physician's Desk Reference, 57th ed., 2507 (2003).

26 ¹⁰ Onychomycosis is a very common fungus infection of the
27 nails, causing thickening, roughness, and splitting. Stedman's
 Medical Dictionary, 27th ed., 1262 (2000).

1 Malik's dorsiflexion¹¹ to be 60/60° bilaterally and palmar
2 flexion to be 70/70° bilaterally, and her finger approximation
3 to be intact. Dr. Gabriel tested Malik's grip strength and
4 found it to be 20/12 lbs., right over left. Dr. Gabriel's
5 clinical findings were that Malik had some swelling around the
6 digits causing some pain when manipulating fine objects, but
7 that she had generally good strength of the right hand, and
8 retained complete use of the fingers of the right hand. Dr.
9 Gabriel stated that Malik would be unable to perform activities
10 requiring fine manipulation of objects or sensation in the
11 fingertips of the right hand, but otherwise she had no
12 limitations. (AR 284-87).

13 On November 21, 2000, three non-examining doctors employed
14 by the State Disability Determination Services (DDS) reviewed
15 the medical evidence in the record and found that Malik did not
16 have a medically determinable impairment. (AR 294-301).

17 In March, 2001, Malik went to Kaiser complaining of muscle
18 pain. She was referred to rheumatology for evaluation. Malik
19 reported that she had stopped taking birth control pills but
20 that she was not sexually active. She continued to receive
21 Methotrexate. (AR 357). On May 11, 2001, Dr. Becker reduced
22 the dosage of Methotrexate. Dr. Becker's note dated May 23,
23 2001 indicated Malik's psoriasis had been much improved with
24 Methotrexate, but also that she was inconsistent in getting the
25

26 ¹¹ Dorsiflexion is the upward movement of the foot or toes
27 or of the hand or fingers. Stedman's Medical Dictionary, 27th
ed., 537 (2000).

1 injections and follow up laboratory studies. (AR 355).
2 However, Dr. Becker noted that Malik reported that she might be
3 pregnant. On May 25, 2001, Dr. Becker discontinued the
4 Methotrexate until June 8, 2001, after Malik had taken a
5 pregnancy test. (AR 356, 354). Dr. Becker's note indicated
6 that Malik was to be given monthly pregnancy tests and he was to
7 be notified if Malik did not hold to the monthly schedule. (AR
8 354).

9 On June 11, 2001, Malik was evaluated by Dr. Stephanie Chu
10 for complaints of hand pain. Physical examination revealed mild
11 diffuse swelling and increased warmth. There was no indication
12 of any joint problems. Dr. Chu stated that Malik's hand pain
13 could not be explained, yet it was clearly not classic for
14 psoriatic arthropathy. (AR 351-52). An x-ray of Malik's right
15 hand dated June 11, 2001 revealed no abnormality except a
16 discrete radiolucent area in the terminal phalanx of the index
17 finger which was probably developmental. (AR 366). A follow-up
18 examination by Dr. Chu on July 9, 2001, again revealed mild
19 diffuse swelling. (AR 349-50). On August 22, 2001, a Kaiser
20 doctor noted that Malik's left index fingernail was swollen with
21 the nail lifted fifty-percent off. (AR 347). On September 8,
22 2001, Dr. Chu noted that Malik had marked psoriatic scaling and
23 onychomycosis on multiple fingertips. (AR 343). In a Medical
24 Assessment of Ability to Do Work Related Activities (Physical)
25 dated November 9, 2001, Dr. Chu opined that Malik would be
26 capable of lifting and/or carrying less than ten pounds over the
27 course of less than one-third of an eight-hour day, and she

1 would be unable to perform the fine motor functions required to
2 handle, feel, push, or pull. Dr. Chu also opined that Malik had
3 no limitations in standing, walking, sitting, reaching, seeing,
4 hearing, or speaking, no postural limitations, and no
5 environmental restrictions. (AR 319-20). On January 22, 2002,
6 Dr. Chu noted that Malik had not been on any medications for two
7 weeks because she lost them when her luggage was stolen. (AR
8 333).

9 In a letter dated March 29, 2002 to Malik's representative,
10 Dr. Chu states, "This is a patient with unusual hand pains . . .
11 I do believe that her pain and discomfort, due to the psoriatic
12 process in her nails and her fingertips, are significant enough
13 that they preclude her from doing most types of work.
14 Certainly, any type of work that would involve constant use of
15 the hands is not possible for this patient." (AR 316-18).

16 To assess Malik's allegation of a mental impairment due to
17 depression, she was referred for a psychological evaluation by
18 psychologist Jennifer B. Kirkland, Ph.D., on October 11, 2000.
19 Dr. Kirkland noted that Malik did not put much effort into the
20 evaluation, and generally did not make it past the introductory
21 items on the psychological tests she was given. Dr. Kirkland
22 observed that Malik would spontaneously give a correct answer
23 and then go back and change it to an incorrect answer. Dr.
24 Kirkland indicated that Malik's low performance on the tests was
25 suggestive of malingering and her low effort and motivation
26 rendered testing essentially invalid and not indicative of her
27 current functioning. Dr. Kirkland also noted inconsistencies in
28

1 Malik's reporting of her medical condition, raising questions as
2 to her credibility. For instance, Dr. Kirkland noted that she
3 observed Malik scratch and pick at the scabs on the fingers and
4 nails of her right hand throughout the testing, despite the fact
5 that she reported her hand was often too sensitive to use for
6 anything. Dr. Kirkland diagnosed Malik with malingering and
7 substance abuse of alcohol, recreational street drugs and pain
8 killers. Dr. Kirkland acknowledged the difficulty in assessing
9 Malik's day-to-day functional capacity on the basis of a single
10 consultation. However, she opined that Malik could be expected
11 to understand, carry out and remember simple instructions. (AR
12 289-92).

13 B. Hearing Before the ALJ

14 At the May 21, 2002 hearing before the ALJ, Malik testified
15 that she was currently unable to work due to pain in her hands.
16 She testified that she was unable to do any household chores,
17 cooking, shopping, go to church, go to the movies, play sports
18 or do any activities with her daughter. (AR 49-51). Malik
19 testified that during a typical day she usually sat in the front
20 yard and watched children play. (AR 51). She testified that
21 she was sometimes unable to get herself dressed and undressed
22 and could not put on or tie her shoes. She also testified that
23 she had to bandage her hands before putting on clothes because
24 her nails clung to them. (AR 55-56). She was wearing a splint
25 at the hearing which she stated she wore to keep pus from
26 draining out of her fingernails and to protect her nails and
27 fingers. (AR 56-57). She stated that she did not cook because

1 her hands got numb and she had been dropping plates and cups a
2 couple of days before the hearing. (AR 57). She stated that in
3 order to eat she had to cradle a spoon between her thumb and
4 index finger. (AR 58). She testified that her hand problem
5 first made it hard to work in 1996 after the doctor removed her
6 fingernail. (AR 59). She also stated that her hands were so
7 tender that anytime she touched or picked up an object she was
8 in pain. (AR 59-60). She stated she had pain even without
9 touching things, though it was not as bad. (AR 60). She also
10 testified that she could pick up objects but could not hold them
11 for too long. (AR 68-69). She stated there was nothing she
12 could do at home to make her pain better. (AR 69). She stated
13 she had been taking Methotrexate pills but they did not help.
14 She testified that she stopped getting Methotrexate injections
15 because it was not doing anything for her. (AR 69).

16 C. The ALJ's Decision

17 The ALJ employed the five-step sequential process to
18 evaluate Malik's claim of disability. 20 C.F.R. §§ 404.1520(b)-
19 (f). At step one, the ALJ concluded that Malik's work activity
20 in 1989 did not constitute substantial gainful activity and she
21 had not worked since. (AR 26).

22 At step two, the ALJ found that Malik's psoriasis was a
23 severe impairment because it resulted in difficulty with
24 sensation in the fingertips of her right hand and limitation in

25

26

27

28

1 her ability to perform fine manipulation with her right hand.¹²

2 At step three, the ALJ found that Malik's impairment was not
3 severe enough to meet or medically equal one of the impairments
4 listed in Appendix 1, Subpart P, Regulation No. 4 (Social
5 Security Ruling (S.S.R.) 96-6p). (AR 32). The ALJ found that,
6 although Malik has a long history of pustular psoriasis, it has
7 been confined primarily to several fingers of her right hand and
8 there is no indication that her condition does not respond to
9 prescribed treatment. (AR 32).

10 At step four, the ALJ found that Malik had no past relevant
11 work so he proceeded to step five. At step five, to decide
12 whether Malik could do her past relevant work or other work
13 existing in significant numbers in the national economy, the ALJ
14 considered the medical evidence to assess Malik's residual
15 functional capacity (RFC). The ALJ determined that Malik was
16 precluded from work requiring fine manipulation of objects or
17 sensation in the fingertips, but that she was not limited in her
18 capacity for gross manipulation or reaching with either upper
19 extremity or standing, walking, sitting, lifting, carrying,
20 pushing or pulling. Relying on the Medical Vocational
21 Guidelines (Grids), the ALJ found that, although Malik's
22 limitation significantly narrowed the potential occupational
23 base of unskilled sedentary and light work, she was not disabled
24 because the potential occupational base of unskilled medium,

25 ¹² At step two, the ALJ analyzed whether Malik's claim of
26 depression was severe and concluded that it was not. Malik does
27 not contest this conclusion. Therefore, the Court will not
address the ALJ's analysis of Malik's depression.

1 heavy and very heavy work remained intact. (AR 35).

2 To support his conclusion, the ALJ noted that Malik had made
3 a number of inconsistent statements which brought her
4 credibility into question. The ALJ found that Malik's
5 allegation of constant pain was not supported by the evidence.
6 The ALJ stated that, although treating physicians had indicated
7 that some pain could reasonably be expected due to her
8 psoriasis, several doctors had expressed concerns that Malik had
9 been abusing pain medications. The ALJ noted that there was no
10 indication that her condition did not respond to prescribed
11 treatment and there was evidence that Malik was not compliant in
12 following prescribed treatment. The ALJ also pointed out that
13 Malik had failed to keep no fewer than twenty-five appointments,
14 which suggested her symptoms may not have been as limiting as
15 she claimed. In addition, the ALJ noted that Malik's work
16 history revealed that she worked only sporadically prior to the
17 alleged disability onset date, which raised questions as to
18 whether her continuing unemployment was actually due to medical
19 impairments.

20 The ALJ stated that he afforded Dr. Chu's opinion little
21 weight because it was not supported by the record, particularly
22 with respect to Malik's ability to lift or carry. However, the
23 ALJ indicated that he had not entirely rejected Dr. Chu's
24 opinion and had incorporated some of her limitations into the
25 RFC he adopted. The ALJ noted the possibility that a doctor may
26 express an opinion in an effort to assist a patient with whom
27 she sympathizes or that a doctor may provide such a note in

1 order to avoid tension with the patient. The ALJ concluded that
2 because Dr. Chu's opinion departed substantially from the rest
3 of the evidence, such a motive may have been likely. The ALJ
4 "afforded significant weight" to Dr. Gabriel's opinion, "as it
5 is well-supported by the objective evidence as well as the other
6 substantial evidence of record, and supported a finding of not
7 disabled." (AR 33-34).

LEGAL STANDARD

9 A court cannot set aside a denial of benefits unless the
10 Commissioner's findings are based upon legal error or are not
11 supported by substantial evidence in the record as a whole. 42
12 U.S.C. § 405(g); Magallanes v. Bowen, 881 F.2d 747, 750 (9th
13 Cir. 1989); Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir.
14 1986); Taylor v. Heckler, 765 F.2d 872, 875 (9th Cir. 1985).
15 Substantial evidence is such relevant evidence as a reasonable
16 mind might accept as adequate to support a conclusion.
17 Richardson v. Perales, 402 U.S. 389, 401 (1971); Orteza v.
18 Shalala, 50 F.3d 748, 749 (9th Cir. 1995). It is more than a
19 scintilla but less than a preponderance. Sorenson v.
20 Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975).

To determine whether substantial evidence exists to support the ALJ's decision, a court reviews the record as a whole, not just the evidence supporting the decision of the ALJ. Walker v. Matthews, 546 F.2d 814, 818 (9th Cir. 1976). A court may not affirm the Commissioner's decision simply by isolating a specific quantum of supporting evidence. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). In short, a court must weigh the

United States District Court

For the Northern District of California

1 evidence that supports the Commissioner's conclusions and that
2 which does not. Martinez, 807 F.2d at 772.

3 If there is substantial evidence to support the decision of
4 the ALJ, it is well-settled that the decision must be upheld
5 even when there is evidence on the other side, Hall v.
6 Secretary, 602 F.2d 1372, 1374 (9th Cir. 1979), or when the
7 evidence is susceptible to more than one rational
8 interpretation. Gallant v. Heckler, 753 F.2d 1450, 1453 (9th
9 Cir. 1984). If supported by substantial evidence, the findings
10 of the Commissioner as to any fact will be conclusive. 42
11 U.S.C. § 405(g); Vidal v. Harris, 637 F.2d 710, 712 (9th Cir.
12 1981).

13 Under the Social Security Act, "disability" is defined as
14 the:

15 inability to engage in any substantial gainful
16 activity by reason of any medically determinable
17 physical or mental impairment which can be
expected to result in death or which has lasted or
can be expected to last for a continuous period of
not less than twelve months.

18 42 U.S.C. § 423 (d)(1)(A). The impairment must be so severe
19 that the claimant "is not only unable to do his previous work
20 but cannot . . . engage in any other kind of substantial gainful
21 work." 42 U.S.C. § 423(d)(2)(A). In addition, the impairment
22 must result "from anatomical, physiological, or psychological
23 abnormalities which are demonstrable by medically acceptable
24 clinical and laboratory techniques." 42 U.S.C. § 423(d)(3).

25 To determine whether a claimant is disabled within the
26 meaning of the Social Security Act, the Social Security
27

1 Regulations set out a five-step sequential process. 20 C.F.R. §
2 404.1520 (b)-(f); Baxter v. Sullivan, 923 F.2d 1391, 1395 (9th
3 Cir. 1991); Reddick v. Chater, 157 F.3d 715, 721 (9th Cir.
4 1998). The burden of proof is on the claimant in steps one
5 through four. Sanchez v. Secretary of Health and Human Servs.,
6 812 F.2d 509, 511 (9th Cir. 1987). In step one, the claimant
7 must show that she or he is not currently engaged in substantial
8 gainful activity. 20 C.F.R. § 404.1520(b). In step two, the
9 claimant must show that he or she has a "medically severe
10 impairment or combination of impairments" that significantly
11 limit his or her ability to work. 20 C.F.R. § 404.1520(c);
12 Bowen v. Yuckert, 482 U.S. 137, 140 (1987); Smolen v. Chater, 80
13 F.3d 1273, 1290 (9th Cir. 1996). If the claimant does not, he
14 or she is not disabled. Otherwise, the process continues to
15 step three for a determination of whether the impairment meets
16 or equals a "listed" impairment which the regulations
17 acknowledge to be so severe as to preclude substantial gainful
18 activity. Bowen, 482 U.S. at 141; 20 C.F.R. § 404.1520(d); 20
19 C.F.R. § 404, Subpt. P, App.1. If this requirement is met, the
20 claimant is conclusively presumed disabled; if not, the
21 evaluation proceeds to step four. At step four, it must be
22 determined whether the claimant can still perform "past relevant
23 work." Bowen, 482 U.S. at 141; 20 C.F.R. § 404.1520(e). If the
24 claimant can perform such work, he or she is not disabled. If
25 the claimant meets the burden of establishing an inability to
26 perform prior work, the burden of proof shifts to the
27 Commissioner for step five. At step five, the Commissioner must

1 show that the claimant can perform other substantial gainful
2 work that exists in the national economy. Bowen, 482 U.S. at
3 141; 20 C.F.R. § 1520(f).

4 DISCUSSION

5 Malik moves for summary judgment or remand on the grounds
6 that: (1) the ALJ improperly rejected the opinion of her
7 treating physician, Dr. Stephanie Chu, with insufficient
8 substantive analysis; (2) the ALJ failed to follow the SSA's own
9 rules and regulations in assessing Malik's RFC; (3) the ALJ
10 failed to obtain vocational expert testimony, but instead relied
11 on the Medical Vocational Guidelines despite the presence of
12 significant non-exertional impairments; and (4) the ALJ's key
13 findings are not supported by substantial evidence.

14 I. Opinion of the Treating Physician

15 Citing Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1998),
16 Malik argues that the ALJ improperly rejected the opinion of Dr.
17 Chu, her treating physician, because the ALJ failed to set forth
18 specific and legitimate reasons for doing so, and instead
19 adopted the opinion of Dr. Gabriel, whom Malik saw only once.
20 Malik also argues that Dr. Chu's conclusion that Malik has
21 significant limitations in lifting and constant use of her hands
22 has a strong evidentiary basis in the record.

23 As a general rule, the opinion of a treating doctor should
24 be given more weight than the opinion of doctors who do not
25 treat the claimant. Winans v. Bowen, 853 F.2d 643, 647 (9th
26 Cir. 1987). Where a treating physician's opinion is contradicted
27 by another doctor, the Commissioner may reject the treating

1 physician's opinion, but must provide "specific, legitimate
2 reasons" supported by substantial evidence in the record for
3 doing so. Rodriquez v. Bowen, 876 F.2d 759, 762 (9th Cir.
4 1989); Murray v. Heckler, 722, F.2d 499, 502 (9th Cir. 1983).
5 The opinion of a non-examining physician alone will not
6 constitute substantial evidence that justifies the rejection of
7 the opinion of either a treating or examining physician. Pitzer
8 v. Sullivan, 908 F.2d 502, 506 n.4 (9th Cir. 1990); Gallant v.
9 Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984). However, the
10 opinion of a non-examining physician in conjunction with medical
11 evidence and contradictory reports from examining physicians
12 constitutes substantial evidence for rejecting a treating
13 physician's opinion. Magallanes, 881 F.2d at 751-52; Andrews v.
14 Shalala, 53 F.3d 1035, 1042-43 (9th Cir. 1995).

15 Although the ALJ stated that he gave Dr. Chu's opinion
16 little weight, he only rejected the part of her opinion
17 regarding Plaintiff's ability to lift and carry. The ALJ did
18 provide specific, legitimate reasons for rejecting this part of
19 Dr. Chu's opinion: it departed substantially from the rest of
20 the evidence. There is no evidence that Dr. Chu tested Malik's
21 hand strength or her functional abilities. Dr. Gabriel tested
22 Malik's grip strength and her upper extremities. He found that
23 she had some swelling around the digits causing some pain when
24 manipulating fine objects, but that she had generally good
25 strength of the right hand, and retained complete use of the
26 fingers of the right hand. He stated that Malik would be unable
27 to perform activities requiring fine manipulation of objects or

1 sensation in the fingertips of the right hand, but otherwise she
2 had no limitations. The ALJ also noted that the non-examining
3 DDS physicians' opinions supported Dr. Gabriel's. Further, even
4 Dr. Chu indicated that Malik's hand pains were unusual and very
5 difficult to explain.

6 Accordingly, the ALJ did not err in rejecting Dr. Chu's
7 opinion regarding Plaintiff's ability to lift and carry in favor
8 of Dr. Gabriel's.

9 II. Residual Functional Capacity

10 Malik argues that the ALJ erred by not specifically
11 addressing her capacity for using her hands on a sustained basis
12 over the course of a work day, including forceful gripping,
13 lifting, or carrying heavy objects.

14 A plaintiff's RFC is the most he or she "can still do
15 despite his [or her] limitations." 20 C.F.R. § 416.945(1). It
16 is his or her maximum ability to perform sustained work in an
17 ordinary work setting on a regular and continuing basis, eight
18 hours a day for five days a week. Id. The RFC assessment must
19 first identify the individual's functional limitations or
20 restrictions and assess his or her work-related abilities on a
21 function-by-function basis. S.S.R. 96-8P at *1. Only after
22 that may an individual's RFC be expressed in terms of the
23 exertional levels of work: sedentary, light, medium, heavy and
24 very heavy. Id.

25 The ALJ found that Malik could not perform work requiring
26 fine manipulation of objects or sensation in the fingertips of
27 the right hand, but that she is not limited in gross

1 manipulation of objects or in reaching with either upper
2 extremity, lifting, carrying, pushing or pulling. To support
3 this conclusion, the ALJ relied on Dr. Gabriel's opinion,
4 stating that "it is well supported by the objective evidence as
5 well as the other substantial evidence of record . . ." (AR
6 34). The ALJ also based his finding on Malik's lack of
7 credibility.

8 Malik does not dispute the ALJ's conclusions regarding her
9 credibility. However, she does dispute the ALJ's reliance on
10 Dr. Gabriel's opinion.

11 As stated above, however, the ALJ did not err in relying on
12 Dr. Gabriel's opinion because it is supported by substantial
13 evidence in the record. Dr. Chu did conclusorily state that
14 Malik was limited in lifting and carrying; as stated above, the
15 ALJ did not err in discounting that part of her opinion. Dr.
16 Chu did not mention Malik's ability to grip. Thus, the ALJ did
17 not err in finding that Malik retained the ability to perform
18 unskilled medium, heavy and very heavy work despite her
19 impairments, and properly assessed Malik's RFC.

20 III. Medical Vocational Guidelines

21 Malik argues that the ALJ failed to consider her non-
22 exertional limitations such as in the constant use of her hands
23 or the performance of tasks requiring prolonged or repeated
24 forceful gripping. Malik argues that, had these additional non-
25 exertional limitations been included in her RFC, at step five of
26 his analysis, the ALJ could not have relied on the Medical
27 Vocational Guidelines (Grids), but would have had to consult a

1 vocational expert to determine whether jobs existed in
2 significant numbers in the economy to accommodate her
3 disability.

4 The ALJ found that Malik was precluded from work requiring
5 fine manipulation of objects or sensation in the fingertips and
6 that, although this limitation significantly narrowed the
7 potential occupational base of unskilled sedentary and light
8 work, the potential occupational base of unskilled medium,
9 heavy, and very heavy work remained intact. Relying on the
10 guidelines set forth in S.S.R. 85-15, the ALJ found that,
11 because Malik's nonexertional limitations did not significantly
12 compromise her ability to perform work at all exertional levels,
13 a finding of not disabled was appropriate.

14 The Medical-Vocational Guidelines are administrative tools
15 that the Commissioner may use at step five of the disability
16 evaluation. Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir.
17 1988). Based on age, education, work experience, and
18 "exertional capacity," the guidelines determine the
19 employability of claimants with "substantially uniform levels of
20 impairment." Id.; see also 20 C.F.R. pt. 404, subpt. P, app. 2.
21 However, the ALJ may rely on the guidelines only when they
22 "accurately and completely describe the claimant's abilities and
23 limitations." Burkhart, 856 F.2d at 1340; see also Tackett v.
24 Apfel, 180 F.3d 1094, 1102 (9th Cir. 1999). If a claimant has
25 an impairment that limits his or her ability to work without
26 directly affecting his or her strength, the claimant is said to
27 have non-exertional (not strength-related) limitations that are

1 not covered by the grids. 20 C.F.R., pt. 404, subpt. P., app. 2
2 § 200.00(d),(e). When a claimant suffers from non-exertional
3 impairments that are "sufficiently severe" to significantly
4 limit the range of work permitted by his or her exertional
5 abilities, the guidelines are inapplicable. Tackett, 180 F.3d
6 at 1102. In such instances, the ALJ must consider the testimony
7 of a vocational expert and identify specific jobs that are
8 within the claimant's capabilities. Burkhart, 856 F.2d at 1340.
9

10 In S.S.R 85-15, the SSA indicated that the loss of fine
11 manual dexterity narrows the sedentary and light ranges of work
12 much more than it does the medium, heavy and very heavy ranges
13 of work. S.S.R. 85-15 at *7. S.S.R. 85-15 also provides that a
14 vocational expert would not ordinarily be required where a
15 person has a loss of ability to feel the size, shape,
16 temperature, or texture of an object by the fingertips, because
17 this is a function required in very few jobs. Id. As stated
18 above, the ALJ did not err in finding that Malik had no other
19 limitations. There is no evidence that Malik could not perform
20 tasks requiring prolonged or repeated forceful gripping, as
21 Malik argues. Because Malik's non-exertional impairment is not
22 severe enough to limit significantly her range of work, the
23 ALJ's use of the grids was proper and there was no need to call
24 a vocational expert.

25 IV. Substantial Evidence

26 Plaintiff argues that the ALJ's finding that Plaintiff is
27 totally unrestricted and able to perform work at every

1 exertional level is not supported by substantial evidence. In
2 support of this argument, Plaintiff cites the medical evidence
3 and Plaintiff's testimony that she has significant limitations
4 in the use of her hands due to pain caused by the psoriatic
5 conditions.

6 As discussed previously, the ALJ correctly relied upon Dr.
7 Gabriel's opinion in determining Plaintiff's RFC. Additionally,
8 the ALJ found Plaintiff's credibility to be questionable.
9 Although Plaintiff does not dispute the ALJ's finding regarding
10 her lack of credibility, it is appropriate to discuss it here
11 because she relies on her testimony to support this claim.

12 The ALJ's determination regarding Plaintiff's lack of
13 credibility was supported by substantial evidence. Dr. Kirkland
14 reported that Plaintiff did not put much effort into her
15 psychological testing and that she would even spontaneously give
16 a correct answer but then go back and change it to an incorrect
17 answer. Dr. Kirkland opined that Plaintiff's performance was
18 indicative of malingering which rendered her testing essentially
19 invalid. Dr. Kirkland noted inconsistencies in Plaintiff's
20 reporting of her medical condition which also raised questions
21 regarding her credibility. Dr. Kirkland reported that Plaintiff
22 admitted to substance abuse of alcohol, recreational street
23 drugs and pain killers. Furthermore, many notations in
24 Plaintiff's medical records questioned whether Plaintiff was
25 exaggerating her pain in order to obtain pain killers. Because
26 the ALJ's finding regarding Plaintiff's credibility is supported
27 by substantial evidence, Plaintiff cannot rely on her testimony

1 to substantiate her argument that she could not use her hands
2 due to pain.

3 In addition, Defendant argues that a controlled impairment,
4 or one that is reasonably controllable, cannot be used as a
5 basis for disability. Odle v. Heckler, 707 F.2d 439, 440 (9th
6 Cir. 1983) (finding proper ALJ's decision not to consider
7 claimant's controlled impairments); Sample v. Schweiker, 694
8 F.2d 639, 643 (9th Cir. 1982) (proper inquiry is whether
9 impairment is amenable to control). Malik does not respond to
10 this argument.

11 The ALJ found that Malik was not compliant with the
12 medication regimen that had been successful in treating her
13 impairment based on the following evidence. On March 20, 1997,
14 Dr. Tenner indicated that Malik's psoriasis had improved with
15 Methotrexate; however, Malik indicated she believed it made the
16 psoriasis worse. On August 20, 1997, Dr. Reddy noted that Malik
17 had self-discontinued her Prednisone and Methotrexate because
18 she thought they were making her psoriasis worse. On September
19 14, 1998, Dr. Tenner indicated that Malik took Thioguanine for
20 only a few days in July and then discontinued it. He stated
21 that Malik did not do well on oral medications due to compliance
22 problems. Dr. Becker's treatment note dated July 11, 2000
23 indicated that Malik's psoriasis had improved following
24 Methotrexate injections. Dr. Becker's note dated May 23, 2001
25 indicated Malik's psoriasis had been much improved with
26 Methotrexate but she was inconsistent in getting the injections.
27 This evidence substantiates the ALJ's finding that Malik was not
28

1 compliant with her prescribed treatment.

2 Therefore, Plaintiff's claim that the ALJ's evidentiary
3 findings is not supported by substantial evidence is DENIED.

4 CONCLUSION

5 For the foregoing reasons, Malik's motion for summary
6 judgment or remand is DENIED. Defendant's cross motion for
7 summary judgment

8
9
10 is GRANTED. Judgment shall enter accordingly. Each party shall
11 bear her own costs.

12 IT IS SO ORDERED.

13
14 Dated: 5/18/05

15 /s/ CLAUDIA WILKEN
16 CLAUDIA WILKEN
17 United States District Judge